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Nguyen Tri Dung v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO J-05(M)-6–01 OF 2016
TENGKU MAIMUN, AHMADI ASNAWI AND KAMARDIN HASHIM JJCA
30 SEPTEMBER 2016

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Criminal Law — Dangerous drugs — Trafficking in dangerous drugs — Appellant convicted and sentenced to death for offence of trafficking in dangerous drugs — Appellant appealed against conviction and sentence — Whether trial judge erred in invoking double presumptions and in making affirmative finding of possession — Whether trial judge erred in not making finding whether appellant rebutted presumption of trafficking — Whether trial judge erred in evaluation of defence — Dangerous Drugs Act 1952 s 39B(1)(a) and (2)

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The appellant was charged with the offence of trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') punishable under s 39B(2) of the same. The respondent's case was that, the customs officer who was on duty at the Senai International Airport had found a lace fabric which contained 3,736.77g of methamphetamine inside a black bag carried by the appellant who was travelling from India. In his defence, the appellant contended that the black bag was given to him by a woman he met in India and he did not have any knowledge of the drugs found in the black bag. The crux of the appellant's case was premised on the defence of innocent carrier. The trial judge found that the appellant had failed to cast any reasonable doubt on the prosecution's case and thus convicted and sentenced the appellant to death, hence this appeal. There were three grounds of appeal brought by the appellant namely: (a) that the learned trial judge erred in invoking double presumptions and in making an affirmative finding of possession; (b) that the learned trial judge erred at the end of defence case in not making a finding whether the appellant had rebutted the presumption of trafficking; and (c) that the learned trial judge erred in his evaluation of the defence.

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Held, dismissing the appeal and affirming the conviction and sentence of the High Court:

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(1) The grounds of judgment must be read as a whole and based on the judgment as a whole, there was no doubt that in calling upon the appellant to enter his defence, the learned trial judge found that the appellant had mens rea or direct possession of the dangerous drugs. The

learned trial judge had also held that the appellant was trafficking in dangerous drugs as defined under s 2 of the DDA. Thus based on the finding, the issue of invocation of double presumptions by the learned trial judge and the failure to make a finding on the rebuttal of presumption of trafficking did not arise (see paras 25–26 & 28).

(2) There was no merit in the appellant's submission that the learned trial judge had made an inconsistent finding as regards whether the appellant had inspected the black bag. What was referred to by the appellant at p 20 of the appeal record, Vol 1 which stated that the appellant had inspected the bag was not a finding made by the learned trial judge but was merely His Lordship's narration of the appellant's evidence (see para 29).

(3) There was no error of fact or law in the evaluation of the defence and the court agreed with the learned trial judge that the defence of innocent carrier was not available to the appellant as he was guilty of willful blindness. Further, the court also found that the woman was a fictitious character and was a mere figment of the appellant's imagination. Thus, the appellant had failed to raise a reasonable doubt on the prosecution's case (see paras 30 & 33).

[Bahasa Malaysia summary

Perayu didakwa dengan kesalahan mengedar dadah berbahaya di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') yang boleh dihukum di bawah s 39B(2) Akta yang sama. Kes responden adalah bahawa, pegawai kastam yang bertugas di Lapangan Terbang Antarabangsa Senai telah menemui kain lace yang mengandungi 3,736.77g methamphetamine dalam beg hitam yang dibawa oleh perayu yang mengembara dari India. Dalam pembelaannya, perayu berhujah bahawa beg hitam tersebut telah diberikan kepadanya oleh seorang wanita yang ditemuinya di India dan dia tidak mengetahui tentang dadah yang dijumpai dalam beg hitam. Asas kes perayu berlandaskan kepada pembelaan pembawa tidak bersalah. Hakim perbicaraan mendapati bahawa perayu gagal menimbulkan apa-apa keraguan munasabah terhadap kes pendakwaan dan dengan itu menyabitkan dan menjatuhkan hukuman mati ke atas perayu, oleh itu rayuan ini dibuat. Terdapat tiga alasan rayuan yang dikemukakan oleh perayu iaitu: (a) bahawa hakim perbicaraan yang bijaksana terkhilaf dalam menggunakan anggapan berganda dan dalam membuat dapatan afirmatif pemilikan; (b) bahawa hakim perbicaraan yang bijaksana terkhilaf pada akhir kes pembelaan dalam tidak membuat dapatan sama ada perayu telah menyangkal anggapan pengedaran; dan (c) bahawa hakim perbicaraan yang bijaksana terkhilaf dalam penilaiannya berhubung pembelaan.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman Mahkamah Tinggi:

(1) Alasan penghakiman mesti dibaca secara keseluruhan dan berdasarkan penghakiman secara keseluruhan, tidak terdapat keraguan bahawa dalam memanggil perayu untuk membela diri, hakim perbicaraan mendapati bahawa perayu mempunyai mens rea atau pemilikan langsung dadah berbahaya. Hakim perbicaraan juga telah memutuskan bahawa perayu telah mengedar dadah berbahaya seperti yang ditakrifkan di bawah s 2 Akta ADB. Oleh itu berdasarkan dapatan tersebut, isu penggunaan anggapan berganda oleh hakim perbicaraan yang bijaksana dan kegagalan untuk membuat dapatan mengenai bantahan anggapan pengedaran tidak timbul (lihat perenggan 25–26 & 28).

(2) Tiada merit dalam hujahan perayu bahawa hakim perbicaraan yang bijaksana telah membuat dapatan yang tidak konsisten berkenaan sama ada perayu telah memeriksa beg hitam. Apa yang disebut oleh perayu di ms 20 rekod rayuan, Vol 1 yang menyatakan bahawa perayu telah memeriksa beg bukanlah dapatan yang dibuat oleh hakim perbicaraan yang bijaksana tetapi adalah hanyalah penceritaan Yang Arif berhubung keterangan perayu (lihat perenggan 29).

(3) Tiada kesilapan fakta atau undang-undang dalam penilaian pembelaan dan mahkamah bersetuju dengan hakim perbicaraan yang bijaksana bahawa pembelaan pembawa tidak bersalah tidak terpakai kepada perayu kerana dia bersalah disebabkan 'willful blindness'. Seterusnya, mahkamah juga mendapati bahawa wanita tersebut adalah watak fiksyen dan hanyalah merupakan khayalan imaginasi perayu. Oleh itu, perayu telah gagal menimbulkan keraguan munasabah terhadap kes pendakwaan (lihat perenggan 30 & 33).]

Notes

For cases on trafficking in dangerous drugs, see 4(1) *Mallal's Digest* (5th Ed, 2015) paras 976–980.

Cases referred to

Mohamad Hanafi bin Mohamad Hashim lwn Pendakwa Raya [2016] 3 MLJ 723, CA (distd)

PP v Chia Leong Foo [2000] 6 MLJ 705; [2000] 4 CLJ 649, HC (refd)

Seyedalireza Seyedhedayatollah Ehteshamiardestani v PP [2014] 6 MLJ 408, CA (distd)

Soorya Kumar a/l Narayanan @ Narayanasamy v PP [2011] 5 MLJ 774; [2009] 6 CLJ 257, CA (refd)

Ugonna Philip Nwankwo v PP [2016] 4 MLJ 244, CA (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 37(d), (da), 39B(1)(a), (2), First Schedule

Appeal from: Criminal Trial No 45A-07–03 of 2014 (High Court, Johor Bahru)

Md Zahar bin Ngah (Zahar & Partners) for the appellant.
Iswa bt Tonie (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Tengku Maimun JCA (delivering judgment of the court):

[1] The appellant was convicted and sentenced to death by the High Court at Johor Bahru for the following charge:

> Bahawa kamu pada 25 September 2013 jam lebih kurang 4 petang di Unit Khas Pemeriksaan Penumpang ('UKPP'), Lapangan Terbang Antarabangsa Senai, di dalam Daerah Kulaijaya, dalam Negeri Johor Darul Takzim telah didapati mengedar dadah berbahaya iaitu methamphetamine seberat 3,736.77g dan dengan itu kamu telah melakukan kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah s 39B(2) Akta yang sama.

[2] Aggrieved by the conviction and sentence, the appellant appealed to this court.

[3] We heard the appeal and had unanimously dismissed it. We now give our reasons.

THE PROSECUTION'S CASE

[4] On 25 September 2013, customs officer, Noraida bt Hussin ('SP4') was on duty at the Passenger Inspection Unit, Senai International Airport when she inspected and examined a black bag ('exh P8A(1)') carried by the appellant, who was travelling from India. P8A(1) had the name tag of the appellant and was not locked. Upon inspection of P8A(1), SP4 found it to contain lace fabric, neatly tied up. SP4 conducted a detailed inspection on one or two lace fabric. According to SP4, she felt something suspicious, like a powdery substance in the inner of the lace. SP4 informed Mohd Kamal bin Mohd Isa ('SP6') about it who then examined the bag P8A(1) and the lace fabric. SP6 similarly felt the powdery substance in the lace.

[5] The bag P8A(1) was further inspected and examined by Khairulanuar bin Ishak ('SP7') from the Narcotics Unit. SP7 found 16 bundles of lace fabric and inside each lace, there were five wrappers. SP7 removed two of the bundles. Inside the lace, there was a white paper and inside the white paper, was a brown

paper wrapper. When SP7 made an opening of the wrapper, he saw powdery crystalline substance, suspected to be dangerous drugs. The appellant was shown the wrappers and the contents. The appellant just shook his head.

[6] The investigating officer, Nur Amin bin Muhamed Rumsani ('SP8') confirmed that he received the appellant and the exhibits from SP7 whereupon the packets containing the crystalline substance were sent to the chemistry department for analysis.

[7] Upon analysis by the science officer at the chemistry department, Liew Chyi ('SP1'), the substance was confirmed to be methamphetamine, weighing 3,736.77g methamphetamine is listed under the First Schedule to the Dangerous Drugs Act 1952 ('the Act').

FINDINGS AT THE END OF THE PROSECUTION'S CASE

[8] The learned trial judge found that the following ingredients have been proven by the prosecution:

(a) that the impugned drugs were in the possession, custody and control of the appellant;

(b) that the impugned drugs were listed as dangerous drugs within s 2 of the Act or within the First Schedule to the Act; and

(c) that the appellant was trafficking in dangerous drugs.

[9] The appellant was thus called upon to enter his defence.

THE DEFENCE

[10] The appellant gave evidence under oath and his defence as summarised by the learned trial judge was as follows.

[11] The appellant went to India to search for electronic goods to be brought back to his country, Vietnam and to be sold during the Christmas festive season. The appellant was in India for two to three days before he came to Malaysia on 25 September 2013. On the first and second day of his stay in India, the appellant went to the temple to pray. On the third day, he went out to do some shopping where he met a woman who could speak Vietnamese. The woman helped him with his shopping as she was the one who made payment and conversed in Hindi.

[12] The woman asked the appellant whether he would be going back to Vietnam. The appellant replied that he would be going to Malaysia first to

purchase electronic goods. The woman then wanted to see the appellant's flight ticket. Upon seeing the ticket, the woman told the appellant that she had a bag and asked the appellant to bring it back to Malaysia as she was quite old. The appellant asked the woman where the bag was and the woman showed him the bag.

[13] The appellant stated that he asked the woman what was in the bag. She told him that it contained Indian fabric. The appellant asked the woman to open the bag. When the bag was opened, the appellant saw Indian fabric inside the bag. The appellant then said to the woman that he wanted to buy a new bag to put his clothes. The woman said there was no need to purchase another bag as the appellant could put his clothes in her bag which was to be brought to Malaysia.

[14] The appellant further stated that he did ask the woman who will come and collect the bag in Malaysia. He also informed the woman that he has never been to Malaysia and thus would not be familiar with the language and its people. The woman told him that upon his arrival in Malaysia, someone would recognise him by the colour of the clothes that he will be wearing and that someone would assist him in purchasing the electronic goods to be brought back to Vietnam.

FINDINGS AT THE END OF THE DEFENCE CASE

[15] The learned trial judge observed that the crux of the defence case was premised on the defence of innocent carrier ie that whilst the appellant did not deny carrying the bag exh P8A(1), he denied having any knowledge of the drugs found in the bag.

[16] Having analysed the defence and having considered the evidence of the appellant in court as against his cautioned statement, exh D20 (which the learned trial judge found to be inconsistent), His Lordship found that the defence of innocent carrier was not available to the appellant as he had deliberately shut his eyes to the obvious. The learned trial judge held that the appellant failed to cast any reasonable doubt on the prosecution's case. The appellant was thus convicted and sentenced to death, hence the appeal.

THE APPEAL

[17] Learned counsel for the appellant raised the following three grounds of appeal:

(a) that the learned trial judge erred in invoking double presumptions and in making an affirmative finding of possession;

(b) that the learned trial judge erred at the end of the defence case in not making a finding whether the appellant had rebutted the presumption of trafficking; and

(c) that the learned trial judge erred in his evaluation of the defence.

[18] In respect of the first ground of appeal, learned counsel's complaint was that at the end of the prosecution's case, the learned trial judge had invoked both presumptions of possession under s 37(d) and trafficking under s 37(da) of the Act while at the same time, His Lordship had also made an affirmative finding of possession. On this issue, learned counsel cited the decision of this court in *Seyedalireza Seyedhedayatollah Ehteshamiardestani v Public Prosecutor* [2014] 6 MLJ 408 and *Mohamad Hanafi bin Mohamad Hashim v Pendakwa Raya* [2016] 3 MLJ 723 to contend that the learned trial judge had committed a serious misdirection in law.

[19] As for the second ground, learned counsel's complaint rested on the failure of the learned trial judge to make a finding whether the presumption of trafficking had been rebutted by the appellant on the balance of probabilities. Learned counsel relied on the case of *Ugonna Philip Nwankwo v Public Prosecutor* [2016] 4 MLJ 244 to support his argument that the failure of the learned trial judge to make such a finding amounted to another serious misdirection in law.

[20] On the third ground of appeal, learned counsel submitted that the learned trial judge erred in his evaluation of the defence when His Lordship said (AR Vol 1 p 29):

> Reverting to the facts of the instant case, assuming that the woman or girl who had given him the luggage bag P8A(1) bag and he had willingly taken custody and was in control of the bag at the material time. He did have ample opportunity to look into the luggage bag P8A(1) before he made or continued his journey to Johor Bahru. He chose not to do that.

[21] Learned counsel submitted that the above finding was inconsistent with the finding at p 20 of the AR wherein His Lordship had stated that the appellant had inspected the contents of the bag and he found it to contain Indian fabric.

OUR DECISION

[22] The first and the second grounds of appeal will be taken together as both concerned s 37(d) and (da) of the Act.

[23] There were three parts of the complaint raised by learned counsel in

relation to the presumptions under s 37(d) and (da) where the learned trial judge was said to have erred:

(a) in finding mens rea possession as well as in invoking the presumption of possession under s 37(d);

(b) in invoking both presumptions of possession and trafficking under s 37(d) and (da) of the Act respectively; and

(c) in failing to make a finding whether the presumption of trafficking had been rebutted by the appellant.

[24] Several case laws have established the principle that a trial judge must make an election whether to rely on the presumption of possession and direct trafficking or on direct possession and presumed trafficking and that where a presumption was relied upon, there must be a finding whether the presumption has been rebutted by the accused person on a balance of probabilities (see *Soorya Kumar a/l Narayanan @ Narayanasamy v Public Prosecutor* [2011] 5 MLJ 774; [2009] 6 CLJ 257 and *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705; [2000] 4 CLJ 649).

[25] There seemed to be some basis in the complaint of learned counsel if we were to focus only the parts of the grounds of judgment as highlighted by learned counsel. Nonetheless, in our view the grounds of judgment must be read as a whole and looking at the judgment as a whole, we entertained no doubt that in calling upon the appellant to enter his defence, the learned trial judge found that the appellant had mens rea or direct possession of the dangerous drugs. This can be seen in the following finding of the learned trial judge at p 17 of the AR Vol 1:

> The court was of the opinion that since the drugs were found in 80 lace fabric in the luggage bag marked as P8A(1) which has a name tag of the accused, it follows that the accused has had the possession, custody and control of P8A(1) and the 80 lace fabric containing the drugs marked as P6A(1–80).

[26] And as for trafficking, His Lordship found at p 19 of the AR Vol 1:

> The court in the instant case and on the direct evidence that the accused had in his possession of 3,736.77g methamphetamine in the bag marked as P8A(1) can rely on the following acts of trafficking in s 2 which includes carrying and concealing and held that the accused was trafficking in dangerous drug.

[27] On the facts, we found that the authorities cited by learned counsel, namely *Seyedalireza* and *Mohamad Hanafi* can be distinguished from the instant appeal.

[28] In the light of our finding above, the issue of invocation of double presumptions by the learned trial judge and the failure to make a finding on the rebuttal of presumption of trafficking did not arise. We therefore found no serious misdirection by the learned trial judge as to warrant our appellate intervention.

[29] As regards the third ground of appeal, the learned trial judge had set out the evidence of the appellant at pp 20–23 of the AR Vol 1 and his evaluation of the defence at pp 23–29 of the AR Vol 1. There was no merit in learned counsel's submission that the learned trial judge had made an inconsistent finding as regards whether the appellant had inspected the bag P8A(1). We noted that what was referred to by learned counsel at p 20 of the AR Vol 1 which stated that the appellant had inspected the bag was not a finding made by the learned trial judge but was merely His Lordship's narration of the appellant's evidence.

[30] The learned trial judge had dealt with the defence extensively and had given his reasons why he found that the defence of an innocent carrier was not available to the appellant. We found no error of fact or law in the evaluation of the defence and we agreed with the learned trial judge that the defence of innocent carrier was not available to the appellant as he was guilty of wilful blindness. We similarly found that the appellant has failed to raise a reasonable doubt on the prosecution's case.

[31] The appellant stated that he went to India to search for electronic goods but gave no reason why he had to make a visit to Malaysia for the same purpose. Notwithstanding his evidence that he went to the temple in India on the first and second day of his stay, he did not know the name of the temple that he visited. Neither did he know the name of the airport in India and the hotel that he stayed.

[32] His meeting with the woman who allegedly was quite old and who could not bring the bag to Malaysia herself, in our view was inherently incredible for the following reasons:

(a) the appellant had no information about the woman;

(b) he did not know and did not ask the name of the woman;

(c) he did not ask the reason why the bag had to be brought to Malaysia;

(d) he had a business in Vietnam called 'Bien Market' selling electronic appliances but had no documents to prove the business;

(e) despite him telling the woman that he has never been to Malaysia and was not familiar with the place and the people, he chose to come to Malaysia to buy electronic goods; and

(f) the appellant could not remember the hotel he was supposed to stay in Johor Bahru.

[33] If the appellant's visit to Johor Bahru was for a genuine purpose, it was reasonable to expect the appellant to know where he would be staying. For him not to know the hotel that he would be staying, in our view was incredible in itself. Further, it was most incredible for the woman to have the bag with her and to immediately hand it over to the appellant who coincidentally met her whilst shopping and who coincidentally would be travelling to Malaysia, the same destination that the woman wanted to send her bag to. In our judgment, the woman was a fictitious character and was a mere figment of the appellant's imagination.

CONCLUSION

[34] Having regard to the evidence in totality, it was our judgment that the conviction was safe. We therefore dismissed the appeal and we affirmed the conviction and sentence of the High Court.

Appeal dismissed; conviction and sentenced of High Court affirmed.

Reported by Dzulqarnain Ab Fatar